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Supreme Court, U.S.
FILED
DEC 30 1987
JOSEPH F. SPANIOL, JR.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PEABODY COAL COMPANY,
Petitioner,

vs.

MOTILAL MAURYA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. May a state court judgment entered in favor of the employer in an employment discrimination case on the basis of a defense (statute of limitations) not going to the presence or absence of discrimination, which judgment would have *res judicata* (claim-preclusive) effect under state law, bar a Title VII claim in federal court for the same alleged employment discrimination?

2. Under the terms of the Full Faith and Credit Act, 28 U.S.C. §1738, may a federal court refuse to give claim-preclusive effect to the state court judgment on the ground it was based on a "procedural" defense that foreclosed to plaintiff "the opportunity to present his . . . claim" without regard to the preclusive effect the judgment would be given in the courts of the state?

LIST OF PARTIES

Petitioner Peabody Coal Company and respondent Motilal Maurya were the only parties below.

Peabody Coal Company is a corporation wholly owned by Peabody Holding Company, Inc. Peabody Holding Company, Inc. is a corporation owned entirely by Newmont Mining Corporation, Bechtel Investments, Inc., The Boeing Company, Eastern Gas and Fuel Associates, and The Equitable Life Assurance Society of the United States.

Peabody Coal Company has four subsidiaries that are not wholly owned: Kayenta Mobile Home Park (joint venture), Squaw Creek Coal Company (joint venture), Tecumseh Coal Corporation, and Yankeetown Dock Corporation.

Peabody Holding Company, Inc. has five non-wholly owned subsidiaries and sub-subsidiaries ("affiliates" of Peabody Coal Company): North Antelope Coal Company (joint venture), Yaamba Joint Venture, Dominion Terminal Associates (joint venture), Rail to Water Transfer Corporation, and Colony Bay Coal Company (joint venture).

The wholly owned subsidiaries and sub-subsidiaries of Peabody Holding Company, Inc. (also "affiliates" of Peabody Coal Company) are: Powder River Coal Company, Rochelle Coal Company, Midco Supply and Equipment Corporation, Peabody Australia Pty. Ltd., Peabody Terminals, Inc., Western Associated Coal Corp., Gateway Terminals, Inc., Peabody Coal (U.K.) Limited, Peabody Insurance Limited, Trinity Mining Company, NuEast Mining Corp., Coal Properties, Corp., Peabody Development Company, Castner, Curran & Bullitt, Incorporated, Eastern Asssociated Coal Corp., Associated Coal Corp., North Page Coal Corp., Affinity Mining Company, EACC Camps, Inc., Charles Coal Company, Sterling Smokeless Coal Company, Sterling Smokeless Fuel Corp., Canyon Coal Corp., Robin Mining Inc., Raven Mining

Inc., River Properties Corp., Cameo Minerals Inc., Powderhorn Coal Company, and Powderhorn Properties Company.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Peabody Coal Company respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered July 2, 1987 (rehearing denied October 1, 1987).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 823 F.2d 933 (6th Cir. 1987) and is reprinted in the Appendix (A-1). The memorandum decision of the United States District Court for the Western District of Kentucky at Owensboro (Johnstone, C. J.) is unreported and is reprinted in the Appendix (A-14).

JURISDICTION

The United States Court of Appeals for the Sixth Circuit entered judgment on July 2, 1987. Petitioner sought rehearing and rehearing en banc. The petition for rehearing was denied

on October 1, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

THE STATUTORY PROVISION INVOLVED

Title 28 U.S.C. §1738 provides in full as follows:

State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

STATEMENT OF THE CASE

Respondent Motilal Maurya ("Respondent" or Maurya") is a native of India. He was employed by petitioner Peabody Coal Company ("Peabody") as a section foreman at Peabody's Alston #4 underground mine in Ohio County, Kentucky. Respondent was terminated by Peabody on October 12, 1977.

Peabody's stated reasons for terminating Maurya were poor work performance and repeated safety violations. The safety violations included one for which he had been suspended approximately two months prior to his discharge and another, on October 12, 1977, which involved a missed cross-cut that created a serious safety hazard. The last violation, and his response thereto, precipitated his discharge.

On May 2, 1978 — more than 180 days after his discharge on October 12, 1977 — Respondent filed a discrimination complaint with the Kentucky Commission on Human Rights ("KCHR"). The complaint alleged that Maurya had been discriminatorily discharged by Peabody because of his national origin in violation of the Kentucky Civil Rights Act ("KCRA"), Kentucky Revised Statutes §344.040(1). In its Answer filed with the KCHR, Peabody denied any discrimination against Maurya and further specifically asserted that Maurya's complaint was barred by the 180-day statute of limitations contained in KCRA §344.200(1).

A full adversarial trial was conducted by the KCHR on Maurya's complaint. The trial lasted three days and resulted in 970 pages of transcript. Both sides appeared, were represented by counsel, and presented evidence. Numerous witnesses were examined and cross-examined under oath, and dozens of exhibits were offered and received into evidence. The discrimination issue was hotly contested. Peabody also put on evidence supporting its statute of limitations defense, which it continued to press during the trial and in its post-trial brief.

On September 20, 1979 the KCHR entered its "Findings of Fact, Conclusions of Law and Order" (A-31). Although finding that discrimination was "a factor" in Maurya's discharge (A-32 ¶7), the KCHR denied Maurya any relief. The KCHR ordered Peabody to reimburse the Kentucky Division of Unemployment Insurance for unemployment benefits Maurya had received ($2,444), but awarded Maurya neither backpay nor reinstatement. The KCHR specifically found that Maurya "did not use reasonable diligence in seeking other employment after his discharge by [Peabody]" (A-33 ¶9). The KCHR also specifically found that Maurya had in fact been terminatd by Peabody "in October of 1977" (A-32 ¶7) and not in November as Maurya contended. The KCHR nevertheless concluded that Maurya's complaint was "timely" (A-33 ¶2).

Both sides appealed to the Kentucky circuit court. Maurya's circuit court complaint alleged that the KCHR had erred in denying him back pay and reinstatement. Maurya's complaint prayed for "full back pay from the date of his wrongful discharge until such time as he has been reinstated and to order reinstatement by the Defendant, Peabody Coal Company [and] [f]or his court costs herein expended and any other relief to which he may appear entitled, and a reasonable attorney's fee."

Peabody's separate appeal to the circuit court challenged the KCHR's finding that discrimination was "a factor" in Maurya's discharge. Peabody contended that although there was some evidence of discriminatory statements, there was no evidence showing any nexus between such statements and the decision to terminate Maurya, and that the evidence was otherwise insufficient as a matter of law to raise any inference of discrimination on Peabody's part. Peabody also reiterated its position that Maurya's administrative complaint was barred by limitations.

On May 27, 1981, after receiving and reviewing the entire record of proceedings before the KCHR and briefs filed by the parties, the Kentucky circuit court entered a "Final Judgment"

directing dismissal of Maurya's discrimination complaint "with prejudice" on the ground of statute of limitations (A-24). In a six page memorandum opinion, replete with references to the facts in the administrative record, Kentucky statutory and caselaw authority, and analogous federal precedents, the circuit court concluded that the 180-day limitations period began to run in October of 1977 and expired prior to the filing of Maurya's complaint in May of 1978. Having thus determined to enter judgment for Peabody on the basis of its limitations defense, the Kentucky circuit court did not reach "the remaining contentions of the parties concerning whether Peabody in fact discriminated against Maurya by reason of his national origin in terminating his employment and, if so, whether the relief afforded by the Commission was proper" (A-26 & 30).

Maurya appealed from the judgment of the Kentucky circuit court to the Kentucky Court of Appeals. On March 12, 1982, after full briefing and oral argument, the Kentucky Court of Appeals affirmed the circuit court judgment, adopting the trial judge's opinion (A-21). The Kentucky Court of Appeals thereafter denied a motion for rehearing filed by Maurya (A-20). On December 7, 1982 the Supreme Court of Kentucky denied Maurya's petition for discretionary review (A-19).

Maurya filed his Title VII suit in the federal district court on April 16, 1980. The federal complaint, which realleged the same acts of employment discrimination alleged before the KCHR, was filed about six months after Maurya filed his administrative review complaint in the Kentucky circuit court. After the Kentucky circuit court judgment was affirmed on appeal and discretionary review was denied by the Kentucky Supreme Court, Peabody moved for summary judgment in the district court on the ground of res judicata.

The district court, Chief Judge Edward H. Johnstone presiding, granted Peabody's motion. Judgment was entered

for Peabody on the ground that the Kentucky judgment was res judicata and barred Maurya's Title VII claim. The court's memorandum opinion began with the observation that the prior "state proceedings, which afforded Maurya an opportunity for argument on (and review of) the deadline issue, satisfied the requirements of due process" (A-15).[1] Citing the Full Faith and Credit Act, 28 U.S.C. §1738, and this Court's decisions in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982) and *Migra v. Warren City School District Board of Education*, 465 U.S. 75 (1984), the district court's opinion then proceeded to determine the preclusive effect the prior judgment would be given under Kentucky law.

"Under Kentucky law," the opinion states, "*res judicata* bars a second lawsuit if: (1) the parties in the second action were parties to the original suit; (2) the claims brought in the second action are identical to those brought in the original suit; and (3) the original suit was decided on the merits," citing *Newman v. Newman*, 451 S.W.2d 417 (Ky. 1970). There was no question as to the first and second elements, identity of parties and identity of claims (A-16). Maurya's state and federal complaints were identical, and the state and federal statutory provisions under which they were brought are identically worded:

> [B]oth his state and federal complaints alleged discrimination on the basis of national origin, an offense prohibited by KRS 344.040(1) and 42 U.S.C. 2000 e-2(a). The Kentucky and federal statutes are identically worded,[2] and

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[1] Maurya at no time has contended, in either the state or federal proceedings, that the state court (or administrative) proceedings failed to satisfy the requirements of procedural due process under the Fourteenth Amendment, or that the state court judgment was in any respect constitutionally infirm.

[2] Indeed, the KCRA expressly provides that it was enacted "to provide for execution within the State of the policies embodied in [Title VII]." KCRA §§344.020(1)(a) and 344.040.

> evidence that would sustain a cause of action under Chapter 344 of the Kentucky Revised Statutes would sustain a cause of action under Title VII . . . Consequently, Maurya's state and federal claims are identical[3] for purposes of the Kentucky doctrine of *res judicata*. *See Jackson v. Pepper Gasoline Co.*, 144 S.W.2d 212 (Ky. 1940).

Memorandum Opinion (A-16).

The main issue, the district court opinion continued, was whether a Kentucky judgment entered on the basis of a statute of limitations defense is "on the merits" under Kentucky law. Based on Kentucky rules of court and Kentucky case law, Judge Johnstone concluded that where, as here, a Kentucky judgment is expressly stated to be "with prejudice," it "operates as an adjudication upon the merits" and will accordingly bar a second

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[3] The "identity of claims" element is further confirmed by the fact that the parties stipulated in the district court that the entire evidentiary record created before the KCHR would be submitted to Judge Johnstone as and for the trial evidence on Maurya's Title VII claim (subject to the parties' further stipulation that they reserved the right to supplement the record in certain limited respects).

lawsuit, irrespective of the particular grounds that were the basis of the judgment (A-16-17).[4]

Judge Johnstone further determined that the Kentucky judgment was not "a dismissal for lack of jurisdiction." Such a dismissal would not have had res judicata effect under Kentucky law. Judge Johnstone concluded that the KCRA's 180-day limitations period was merely procedural and not a jurisdictional prerequisite. Because "Kentucky's employment discrimination law is expressly modeled on Title VII," he reasoned, this Court's decision in *Zipes v. Trans World Airlines,* 455 U.S. 385 (1982) (holding that Title VII's limitations period is procedural and not jurisdictional) "would be persuasive authority in a Kentucky court on the legal significance of [Kentucky's] 180-day filing deadline" (A-17).

The district court's opinion concluded and held as follows:

> Having found that: (1) Maurya's KCHR and EEOC complaints involved identical parties and identical claims; (2) the final judgment ordering a dismissal, with prejudice, of

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[4] The district court's opinion relied upon *Polk v. Wimsatt,* 689 S.W.2d 363, 365 (Ky.App. 1985) for the proposition that the Kentucky court's dismissal precludes any other claim or action arising out of the same matter. *See also Burlew v. Fidelity Casualty Co. of New York,* 122 S.W.2d 990 (Ky. 1938), where Kentucky's highest court held that a dismissal based soley upon the ground of a successful limitations defense (in federal court) "goes to the merits," and bars any further state claims arising out of the matters alleged. *Id.* at 993. Under Kentucky law, "no fact or question that was . . . litigated or could have been litigated [in the prior proceedings] can thereafter be relitigated by the same parties." *Id.* 994; *accord Stephens v. Goodenough,* 560 S.W.2d 556, 558 (Ky. 1978) (res judicata bars relitigation of "every point which properly belonged to the subject litigation"); *Smith v. Decker,* 374 S.W.2d 487, 490 (Ky. 1964) (same); *Cardinal Bus Lines v. Consolidated Coach Corp.,* 72 S.W.2d 7, 10 (Ky. 1934) (res judicata bars "a second independent cause of action or complaint based upon the *same facts* and upon the same grounds"); *Happy Coal Co. v. Hartbarger,* 65 S.W.2d 977, 978 (Ky. 1933) (same); *Polk,* 689 S.W.2d at 365 (dismissal of first action "precludes another action on the *same matter*").

> Maurya's KCHR complaint as untimely constituted a decision on the merits; and (3) the state court proceedings on the dismissal satisfied the requirements of due process, THE COURT HOLDS that the dismissal of Maurya's state employment discrimination complaint as untimely precludes his timely federal claim.

A-18.

The majority of a panel of the Sixth Circuit below reversed, with one judge dissenting. The majority held that the preclusive effect of the Kentucky judgment was limited to the issue actually litigated and decided by the Kentucky court, namely, the timeliness of Maurya's state charge of discrimination. "[A]ll that the state court proceedings here determined was that Maurya had not filed a timely petition before the state agency" (A-6 n.6). "*Claim* preclusion," the majority continued, was not appropriate because Maurya had been "procedurally barred by his untimely filing with the KCHR" (A-7 n.8) (emphasis in original). The majority held:

> [S]ince plaintiff's access to the Kentucky courts was barred by his failure to first make a timely administrative filing, he had no opportunity to present his national origin discrimination claim. Under such circumstances, principles of res judicata are not applicable. *Whitfield v. City of Knoxville,* 756 F.2d 455 (6th Cir. 1985).

Id. No Kentucky authorities concerning the preclusive effect of the judgment under Kentucky law are considered or cited in the majority opinion.[5]

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[5] The *Whitfield* decision cited by the majority was a Sixth Circuit case involving application of Tennessee law. As this Court emphasized in *Migra,* reliance on federal precedents or precedents from other states does not satisfy §1738's requirement that the law of the rendering state must be applied. 465 U.S. at 87.

Although it refused to accord claim-preclusive (res judicata) effect to the Kentucky judgment, the panel majority did feel constrained by the issue-preclusive (collateral estoppel) effect of the judgment. The majority noted that the state court's finding that Maurya's state charge was untimely "is binding on us" (A-4 & 6). The majority opinion accordingly proceeded to address and resolve the further issue (not raised or briefed by either party) as to whether Respondent's untimely state filing rendered untimely his (otherwise timely) EEOC charge. The majority resolved this non-issue in favor of Respondent, holding that the untimely state charge did not defeat the timeliness of the federal charge. The judgment of the district court was accordingly reversed and the case was remanded for further proceedings.

Circuit Judge Engel dissented in a separate opinion. The majority "errs," he wrote, "in its failure to recognize the preclusive effects of the state court dismissal of Maurya's claim" (A-8). "[U]nder Kentucky law as found by Judge Johnstone and not seriously disputed by the parties [the Kentucky judgment] acts as a determination on the merits and is therefore entitled to preclusive effect under 28 U.S.C. §1738" (A-9). Judge Engel, who would have affirmed the district court, concluded as follows:

> The proposition is well entrenched both in Kentucky and in federal law that Maurya is now precluded from pursuing his federal claim since he initiated his litigation in the Kentucky courts and could have achieved the benefit of a successful result which would have been binding on his employer. Although Maurya's initial resort to the KCHR could not deprive him of his right to a federal trial on his Title VII claim, this does not mean that the state court judgment can be disregarded. *Kremer,* 456 U.S. at 477-78. Section 1738 of Title 28, as interpreted in *Kremer,* requires us to treat the adverse state court judgment, though itself based upon an issue of timeliness, as *res judicata.*

A-10.

REASONS FOR GRANTING THE WRIT

I.

The Question Whether A State Court Judgment Can Have Claim-Preclusive Effect In A Title VII Action Has Not Been, But Should Be, Settled By This Court, And The Conflict Among Lower Court Decisions Should Be Resolved

This Court has not yet addressed the question whether the federal courts in Title VII cases may accord full claim-preclusive effect to state court judgments. Under the doctrine of claim preclusion, or "res judicata in the 'narrow sense,' " all claims and issues that were or *could have been* decided in the prior judicial proceeding are barred from further relitigation in a second proceeding. *Migra,* 465 U.S. at 77 n.1; *Kremer,* 456 U.S. at 466 n.6. "Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, [and] encompasses the law of merger and bar." *Migra, supra.* Issue preclusion (collateral estoppel), by contrast, bars relitigation of issues that were actually litigated and decided in the prior proceeding. *Kremer, supra; Migra, supra.* This case — involving a state court decision rendered on a statute of limitations defense and which expressly disclaimed reaching the "merits" of the allegations of employment discrimination — presents in graphic and paradigmatic fashion the question of the availability of claim preclusion in Title VII cases.

In *Kremer,* this Court addressed the question "whether a federal court in a Title VII case should give preclusive effect to a decision of a state court upholding a state administrative agency's rejection of an employment discrimination claim *as meritless* when the state court's decision would be res judicata in the State's own court." 456 U.S. at 463 (emphasis added). Finding that Title VII contained no express or implied repeal of the Full Faith and Credit Act, 28 U.S.C. §1738, the Court answered the question in the affirmative. This Court held that Rubin Kremer's Title VII claim was barred by the preclusive ef-

fect of the prior New York judgment, because that was the effect the judgment would have in the New York courts[6] and because §1738 required the federal court to accord the state judgment the same effect it would receive in the state's courts.

Kremer, however, was not a claim preclusion case. It did not address the question whether a Title VII claim could be barred by a prior state court judgment that did not reach the allegations of discrimination. Rather, the prior state court judgment in *Kremer* "*necessarily decided* that petitioner's claim under New York law was *meritless.*" 456 U.S. at 480 (emphasis added). This Court's finding that "there is no 'affirmative showing' of a 'clear and manifest' legislative purpose in Title VII" to repeal the preclusion requirements of §1738 was made in the context of "a state court judgment affirming that *a claim of employment discrimination is unproved.*" *Id.* at 485 (emphasis added). *Kremer,* thus does not treat the preclusive effect of a state court judgment as to matters that were not expressly decided by the judgment.

Post-*Kremer* decisions, including one by this Court, have emphasized that the *Kremer* holding is limited to the "issue preclusion" or "collateral estoppel" context. *Marrese v. American Academy of Orthopedic Surgeons,* 105 S.Ct. 1327, 1332-33 (1985) ("*Kremer* illustrates that a federal court can apply state rules of *issue preclusion* to determine if a matter *actually litigated* in state court may be relitigated in a subsequent federal proceeding"); *Cooper v. City of North Olmsted,* 795 F.2d 1265, 1269 (6th Cir. 1986); *Burney v. Polk Community College,* 728 F.2d 1374, 1377 n.8 (11th Cir. 1984); *Unger v. Consolidated Foods Corp.,* 693 F.2d 703, 704 (7th Cir. 1982) (*Kremer* is "a Title VII collateral estoppel case"); *Davis v. United States Steel*

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[6] The KCRA, it should be noted, contains a statutory provision nearly identical to the New York provision this Court found required preclusion of Kremer's claim. *See Kremer,* 456 U.S. at 466-67; *compare* N.Y.Exec.Law §300 (McKinney 1972) *and* KCRA §344.270.

Supply, 688 F.2d 166, 188-89 (3rd Cir. 1982) (dissent) ("The Court's holding [in *Kremer*] is a narrow one. [Kremer was] *collaterally estopped* from relitigating those issues [decided by the New York court]").

Two years prior to *Kremer*, in *Allen v. McCurry*, 449 U.S. 90 (1980), this Court held that constitutional issues previously litigated and decided in a state court proceeding could not be relitigated in a subsequent federal suit brought under 42 U.S.C. §1983. (The *Kremer* opinion states, "our finding that Title VII did not create an exception to §1738 is strongly suggested if not compelled by our recent decision in *Allen*." 456 U.S. at 476.) Two years after *Kremer*, in *Migra*, this Court again took up the question of the preclusive effect of a prior state court judgment in a federal §1983 case. In *Migra*, however, unlike *Allen*, the question was whether *claim* preclusion was permissible in §1983 cases.

The *Migra* opinion notes that "*Allen* . . . made clear that issues actually litigated in a state-court proceeding are entitled to the same preclusive effect in a subsequent federal §1983 suit as they enjoy in the courts of the State where the judgment was rendered." 465 U.S. at 83. *Migra* further observes, however, that *Allen* "left open the possibility" that claim preclusion (as to issues not previously "actually litigated") might not be applicable in §1983 cases and that some decisions by the lower federal courts appeared to conflict on this question. *Id.* & n.6. Petitioner Migra argued that claim preclusion should not be allowed and urged the Court "to interpret the interplay of §1738 and §1983 in such a way as to accord state-judgments preclusive effect in §1983 suits only as to issues actually litigated in state court." *Id.* at 83.

Rejecting the contention, the Court stated:

> It is difficult to see how the policy concerns underlying §1983 would justify a distinction between the issue preclusive and claim preclusive effects of state-court

> judgments . . . If §1983 created an exception to the general preclusive effect accorded to state-court judgments, such an exception would seem to require similar treatment of both issue preclusion and claim preclusion. Having rejected in *Allen* the view that state-court judgments have no issue preclusive effect in §1983 suits, we must reject the view that §1983 prevents the judgment in petitioner's state-court proceeding from creating a claim preclusion bar in this case.
>
> Petitioner suggests that to give state-court judgments full issue preclusive effect but not claim preclusive effect would enable litigants to bring their state claims in state court and their federal claims in federal court, thereby taking advantage of the relative expertise of both forums. Although such a division may seem attractive from a plaintiff's perspective, it is not the system established by §1738. That statute embodies the view that it is more important to give full faith and credit to state-court judgments than to ensure separate forums for federal and state claims. This reflects a variety of concerns, including notions of comity, the need to prevent vexatious litigation, and a desire to conserve judicial resources.
>
> . . . We hold, therefore, that petitioner's state-court judgment in this litigation has the same claim preclusive effect in federal court that the judgment would have in the Ohio state courts.

465 U.S. at 83-85. This Court accordingly vacated a decision of the Sixth Circuit and remanded for application of Ohio law.

A counterpart of the *Migra* decision in the §1983 context is needed in the Title VII context. This Court should definitively rule that in Title VII cases the preclusive effect of a prior state court judgment may properly extend beyond mere issue preclusion (*Kremer*) to full claim preclusion. The court below did not read *Kremer* to require claim preclusion in the circumstances of

this case (A-4 n.3), and limited the preclusive effect of the Kentucky judgment to the single issue actually decided — the timeliness of Respondent's state administrative charge. The case at bar thus squarely presents the claim preclusion issue and provides an appropriate vehicle for the Court to settle this important question of Title VII law. Moreover, this Court's definitive ruling on the issue will resolve a conflict between the Sixth Circuit's decision below (denying claim-preclusive effect) and the decision of the Seventh Circuit in *Wakeen v. Hoffman House, Inc.*, 724 F.2d 1238 (7th Cir. 1984) (granting claim-preclusive effect in a Title VII case).

The Seventh Circuit in *Wakeen* held that a prior state court judgment barred a Title VII claim even though the state judgment was based upon a successful state-law defense that did not go to the presence or absence of discrimination. The Seventh Circuit acknowledged that the employer's state-law defense — that its sexually discriminatory treatment of plaintiff was required by a state "protective statute" — would not have been available to the employer in the federal Title VII case and that, indeed, the employer's actions would have been a violation of Title VII. 724 F.2d at 1241. The Seventh Circuit nevertheless held that the Title VII claim was barred by the claim-preclusive effect of the prior state court judgment.

Other authorities, contrary to the decision below, have accorded claim-preclusive effect to a state court judgment in a federal Title VII case. In *Bray v. New York Life Ins. Co.*, 45 FEP Cases 58, ___ F.Supp. ___ (S.D.N.Y 1987), a case in point, the district court recently held that a Title VII claim was barred by the claim-preclusive effect of a state court judgment entered

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on the basis of a statute of limitations defense.[7] The United States Equal Employment Opportunity Commission, the agency charged by Congress with administrative and enforcement responsibility under Title VII, has likewise interpreted the statute (and this Court's *Kremer* decision) to permit claim preclusion. *See EEOC Decision No. 85-14,* CCH Employment Practices Guide ¶6855 (8/27/85) (*held,* Title VII charge was subject to dismissal by virtue of claim-preclusive effect of prior state court judgment dismissing state-law discrimination claim for lack of prosecution).[8] These rulings also illustrate the frequency with which the lower federal tribunals are faced with the question of claim-preclusive effect of state court judgments in Title VII cases.

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[7] *See also Kirkland v. City of Peekskill,* 828 F.2d 104 (2nd Cir. 1987) (*held,* §1981 claim barred by claim-preclusive effect of prior state court judgment dismissing plaintiff's state claims on timeliness grounds); *Santos v. Todd Pacific Shipyards,* 585 F.Supp. 482 (C.D.Cal. 1984) (same).

[8] The courts of appeals in cases involving discrimination claims brought under the Civil Rights Acts have likewise read *Kremer* to permit claim preclusion. *See, e.g., Lee v. City of Peoria,* 685 F.2d 196 (7th Cir. 1982) (*held,* applying *Kremer* in pre-*Migra* case, race discrimination claims under §1981 and §1983 were barred by claim-preclusive effect of state court judgment even though race issue was not raised, but could have been, in state administrative proceeding affirmed by the judgment); *Kutzik v. Young,* 730 F.2d 149 (4th Cir. 1984) (*held,* applying *Kremer,* §1983 claim was barred by claim-preclusive effect of state court judgment in prior breach of contract action even though the judgment was based on a sovereign immunity defense).

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II.

This Court Should Resolve A Fundamental Conflict In The Decisions Of The Courts Of Appeals As To Whether Requirements Not Grounded In State Preclusion Law Or In Procedural Due Process Must Be Satisfied In Order For A State Court Judgment To Be Given Full Faith And Credit In A Title VII Case

Recent decisions of this Court make clear that §1738 requires federal courts to look to and apply the state's preclusion law in determining the preclusive effect of a state court judgment. *Marrese,* 105 S.Ct. at 1332; *Migra,* 465 U.S. at 81; *Parsons Steel, Inc. v. First Alabama Bank,* 106 S.Ct. 768, 771 (1986); *Kremer,* 456 U.S. at 466. This Court has not hesitated to vacate a lower court decision that rules on the preclusive effect of a state court judgment without discussing or citing state law, or where it is unclear that state law was applied. *Marrese,* 105 S.Ct. at 1329 & 1335 (decision below vacated and remanded where "opinion of Court of Appeals did not discuss Illinois principles of claim preclusion"[9]); *Migra,* 465 U.S. at 87 ("we are unable to determine whether [the district court] was applying what it thought was the Ohio law of preclusion"); *Parsons Steel,* 106 S.Ct. at 772-3 (court of appeals "did not consider the possible preclusive effect under Alabama law of the state-court judgment").

The majority opinion of the Sixth Circuit below, in blatant violation of this Court's pronouncements, denied claim-preclusive effect to the prior Kentucky judgment without men-

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[9] *Marrese* further requires the federal courts to look "*in the first instance* to state law." 105 S.Ct. at 1329 & 1333 (emphasis added). State preclusionary law should be determined *prior to* addressing the question whether an exception to or implied repeal of §1738 exists, because resolution of the state-law question might obviate the need to reach the federal (§1738) issue. *Id.*

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tioning or citing any Kentucky legal authorities.[10] Moreover, it did so in the face of the district court's well-reasoned conclusion, which even Respondent has not disputed (A-9), that the prior Kentucky judgment would be res judicata (claim preclusive) under Kentucky law. The Sixth Circuit determined *sua sponte,* without basis in Kentucky law, that claim preclusion was inapplicable because Maurya had been "procedurally barred by his untimely filing with the KCHR" and accordingly "had no opportunity to present his national origin discrimination claim" (A-7 n.8).

While it is true that the *Kremer* opinion discusses the need for a "full and fair opportunity to litigate," the opinion unequivocally states that the "state proceedings *need do no more than* satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law." 456 U.S. at 481-82 (emphasis added). The opinion continues:

> It has long been established that §1738 does not allow federal courts to employ their own rules of res judicata in determining the effect of state judgments. Rather it goes beyond the common law and commands a federal court to accept the rules chosen by the state from which the judgment is taken . . . As we recently noted in *Allen v. McCurry, supra,* "though the federal courts may look to the common law or to the policy supporting res judicata and collateral estoppel in assessing the preclusive effect of decisions of other federal courts, Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the state from which the judgments emerged would do so."

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[10] This Court's remark in *Parsons Steel* is *apropos:* "the majority of the Court of Appeals gave unwarrantedly short shift to the important values of federalism and comity embodied in the Full Faith and Credit Act." 106 S.Ct. at 771.

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Id. at 481-82.

To say that "due process" must be satisfied, *Kremer* notes, in reality adds nothing to the requirement that state preclusion law must be applied:

> The state must . . . satisfy the applicable requirements of the Due Process Clause. A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment. Section 1738 does not suggest otherwise; other state and federal courts would still be providing a state court judgment with the "same" preclusive effect as the courts of the State from which the judgment emerged. In such a case, there could be no constitutionally recognizable preclusion at all.

456 U.S. at 482.

Here, there has never been any claim or suggestion that the Kentucky proceedings were deficient under the Due Process Clause. The Sixth Circuit's reference to Respondent not being afforded an "opportunity to present his . . . claim" has no constitutional dimension. It is merely a statement of the fact that the discrimination issue was not reached or decided by the Kentucky court due to its threshold determination that Peabody's limitation defense was meritorious. Whatever may be the legal source of the Sixth Circuit's stated reason for denying claim-preclusive effect to the Kentucky judgment, it is clear that the reason is not grounded either in Kentucky preclusionary law or in the requirements of constitutional due process.

Other courts of appeals have squarely rejected the approach of the Sixth Circuit below. They read §1738 and this Court's decisions construing it as prohibiting the denial of preclusive effect to a state court judgment on any ground other than the requirements of state preclusion law or constitutional due process. The Seventh Circuit has held that "a federal court should be

foreclosed from inquiring into the nature of the state court decision if the state would grant it preclusive effect and assuming the due process concerns [are] satisfied." *Unger v. Consolidated Foods Corp.*, 693 F.2d 703, 706 n.7 (7th Cir.), *on remand from* 456 U.S. 1002 (1982) (directing further consideration in light of *Kremer*).

Again, in *Wakeen, supra,* the Seventh Circuit rejected the notion that a federal court should conduct a "focused inquiry" into the basis of the prior state court judgment. 724 F.2d at 1242.

> To require a more specific examination into whether facially identical federal and state laws might yield different results before a federal court can grant preclusive effect to an otherwise final and binding state court decision based on the same operative facts would effectively nullify *Kremer* and frustrate fulfillment of the goals underlying section 1738 and the traditional theories of res judicata and collateral estoppel.

Id.

The Seventh Circuit in *Wakeen* held that the federal courts are constrained to grant preclusive effect to a state court judgment if only two requirements are met: "(1) the state court's decision would be accorded preclusive effect in the state's own courts; and (2) the procedures followed at the state court level comport with the requirements of due process." 724 F.2d at 1241. *Accord, Burney,* 728 F.2d at 1378 (11th Cir. 1984) (only these two criteria must be met in order for a state court judgment to be entitled to full faith and credit in a Title VII case); *Gorin v. Osborne,* 756 F.2d 834, 837-38 (11th Cir. 1985) (*held,* in §1983 case, the only determinative questions were whether the prior judgment was preclusive under state law and whether due process had been satisfied; a further requirement that the state court judgment must be based upon a "minimum level of judicial review" was rejected as inconsistent with *Kremer*). *See also EEOC Decision No. 85-14,* CCH Employment Practices

Guide ¶6855 (8/27/85) and *EEOC Decision No. 85-17,* CCH Employment Practices Guide ¶6858 (9/16/85), where the EEOC interpreted *Kremer* as requiring preclusion of Title VII claims if only the two requirements of (1) preclusion under state law and (2) satisfaction of due process, are met.

Relying on this Court's discussion in *Kremer* (486 U.S. at 481-82), the Seventh Circuit holds that the question whether the state proceedings afforded a "full and fair opportunity to litigate" is determined by "the minimum procedural requirements of the Due Process Clause." *Jones v. City of Alton,* 757 F.2d 878, 884 (7th Cir. 1985); *see also Bray,* 45 FEP Cases at 60, ____ F.Supp. at ____ (rejecting the argument that "the state court's dismissal on limitations grounds has denied [the Title VII plaintiff] a full and fair opportunity to present her case in a judicial forum"). In the Seventh Circuit's view, the "full and fair opportunity" standard imposes no requirement separate or apart from *Kremer's* "minimum procedural due process" requirement.

Other courts of appeals, however, in accord with the Sixth Circuit below, have gone beyond the two *Kremer* requirements and have engrafted additional prerequisites that must be satisfied before a state court judgment will be accorded full faith and credit in a Title VII case. They appear to be adopting versions of the "focused inquiry" approach the Seventh Circuit has rejected. They also, like the decision below, appear to be treating "full and fair opportunity to litigate" as a new and independent ground for denying preclusive effect to state court judgments.

For instance, in *Scroggins v. State of Kansas,* 802 F.2d 1289, 1292-3 (10th Cir. 1986), the Tenth Circuit, while conceding that the plaintiff may well have been "afforded procedural due process within the channels prescribed by state law," refused to grant preclusive effect to a prior state court judgment on the ground that the state judicial review was "narrow and con-

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clusory," which caused the Court of Appeals to be "concerned that a full and fair opportunity to litigate the merits of appellant's claim for racial discrimination . . . was eluded."

Similarly, in *Bottini v. Sadore Management Corp.*, 764 F.2d 116 (2nd Cir. 1985), the Second Circuit, without mentioning any constitutional due process deficiencies in the state proceedings, denied preclusive effect to two prior state court judgments. The Second Circuit reasoned, based on "Congress' objectives in Title VII;"[11] that the "narrow scope of review" in one court proceeding and the "limited jurisdiction" of the court in the other proceeding (resulting in its not being a "competent or appropriate tribunal" to hear plaintiff's religious discrimination claim), meant the plaintiff had not received a "full and fair opportunity to litigate." 764 F.2d at 119-122.

> The scope of the federal law requirements varies depending upon such factors as the nature of the forum and the nature of the federal right at issue. At some point, the importance of the federal rights and limited ability of the state forum to function as final adjudicator of those rights would require such substantial supplemental federal preclusion requirements as to make resort to state preclusion rules a mere token gesture achieved at the expense of judicial economy. We have reached that point in this case.

Id. 1064.

In *Carpenter v. Reed,* 757 F.2d 218 (10th Cir. 1985) the Tenth Circuit, purporting to apply *Kremer,* ruled that a prior state court judgment which would concededly have res judicata effect under state law might nevertheless not bar a §1981 claim. The

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[11] In a similar vein, see the Eleventh Circuit's decision in *Gjellum v. City of Birmingham,* 829 F.2d 1056 (11th Cir. 1987), a §1983 case. The court observed, referring *inter alia* to *Kremer, Migra* and *Allen,* the "the Supreme Court's decisions leave little doubt that federal preclusion requirements must also be satisfied." *Id.* at 1063 (emphasis in original). The opinion further claims that *Kremer* leaves undefined "the outer limits of what additional federal preclusion requirements might apply." *Id.* Based on its reading of the recent decisions of this Court, the Eleventh Circuit concluded:

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Court of Appeals directed the district court, on remand, to give preclusive effect to the prior judgment only if it found that the plaintiff had been required to present his discrimination claim in the underlying state agency proceedings and that the state agency had authority to consider it. 757 F.2d at 220. The Tenth Circuit cited no basis in state preclusion law or in the requirements of procedural due process to support its limitation upon the preclusive effect of the state court judgment.

The post-*Kremer* lower federal court decisions are thus in disarray and reveal fundamental disagreement (indeed confusion) on critical questions concerning the implementation of §1738 in Title VII cases. Does §1738 tolerate denial of preclusive effect of state court judgments for reasons not grounded in state preclusionary laws or the requirements of minimum procedural due process, as the decision below and others hold? Or is that approach inconsistent with the letter and spirit of §1738, as decisions in the Seventh Circuit and elsewhere hold? Put differently, does "full and fair opportunity to litigate" simply mean that "minimum procedural due process" must be satisfied, or does the phrase permit the federal courts to develop and apply some other, undefined standard?

The case at bar presents these issues in pristine fashion. The preclusive effect of state law is clear in this case, has been deter-

mined by the district court[12] and is virtually undisputed by the parties (A-9). Also, there is no question that the requirements of procedural due process were met in the state proceedings in this case.

There is a need for this Court to provide guidance and greater certainty in these matters. The Title VII administrative and judicial scheme is, by statutory design, closely integrated with similar state schemes. *See Kremer,* 456 U.S. at 468-9. Continuing uncertainty as to the effect of invoking state judicial remedies, or of invoking state administrative proceedings that could result in an opposing party invoking state judicial review, is harmful to the interests of charging parties and respondents alike, as well as to the federal-state interplay envisioned by the Title VII scheme. Moreover, "important values of federalism and comity embodied in the Full Faith and Credit Act" are at stake. *Parsons Steel,* 106 S.Ct. at 771.

CONCLUSION

For all of the foregoing reasons, this Court should grant this petition to review the questions presented.

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[12] This Court has often noted that determinations of state law should be made initially by the district courts. *E.g. Marrese,* 105 S.Ct. at 1335; *Migra,* 465 U.S. at 87.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 86-5450

Motilal Maurya,
Plaintiff-Appellant,

v.

Peabody Coal Company,
Defendant-Appellee.

On Appeal from the
United States District Court
for the Western District of Kentucky.

Decided and Filed July 2, 1987

Before: ENGEL, KRUPANSKY and GUY, Circuit Judges.

GUY, Circuit Judge. Plaintiff appeals from a summary judgment granted in favor of defendant dismissing his Title VII employment discrimination suit on the ground of *res judicata*. Our analysis of this litigation differs from that of both the district court and the parties, and, as explained herein, requires us to reverse.

I.

Maurya was terminated from his position with Peabody on October 12, 1977, after working for that company since 1975.[1] Maurya was a native of India, having come to the United States in 1968. Maurya alleged that the termination was because of his national origin.

On March 20, 1978, Maurya filed a discrimination complaint with the Equal Employment Opportunity Commission (EEOC). This complaint was filed 158 days after his termination. On May 2, 1978, plaintiff filed a complaint with the Kentucky Commission for Human Rights (KCHR). This complaint was filed 200 days after termination of plaintiff's employment.[2]

The KCHR held a hearing and on September 20, 1979, issued an order determining that Maurya was discharged by Peabody because of his national origin in violation of Ky. Rev. Stat. 344.040. The KCHR did not order reinstatement or back pay, however, because they also found that Maurya had not exercised "reasonable diligence" in seeking other employment. On October 1, 1979, Maurya filed a motion with the KCHR to renew the proceedings for the purpose of granting back pay and reinstatement.

On October 15, 1979, Peabody appealed the KCHR decision to the Hopkins Circuit Court. On October 17, 1979, the KCHR granted Maurya's motion to reopen and ordered immediate

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[1] There is some dispute as to the actual date of termination, but we use October 12, 1977, because that is the earliest date that termination could be possible.

[2] Plaintiff makes the unsupported allegation that he actually went to the KCHR in February of 1978. We need not resolve this claim, however, due to the conclusion we arrive at in these proceedings.

reinstatement. Maurya then filed his own circuit court suit challenging the KCHR's den al of back pay. On October 25, 1979, Peabody filed a second appeal seeking review of the amended KCHR order which granted reinstatement. All of these appeals were ultimately consolidated.

Prior to a decision by the Hopkins Circuit Court, the EEOC, on January 24, 1980, issued a Right to Sue letter to Maurya, and on April 16, 1980, Maurya filed this action in the District Court for the Western District of Kentucky.

On May 27, 1981, the Hopkins Circuit Court issued a judgment setting aside the two KCHR orders. Both orders were set aside because the court determined that Maurya had failed to file a complaint with the KCHR within 180 days of the alleged unlawful termination as is rquired by the applicable Kentucky statute. Ky. Rev. Stat. 334.200(1). On March 12, 1982, the Kentucky Court of Appeals affirmed the decision of the Hopkins Circuit Court, and on December 7, 1982, the Kentucky Supreme Court denied discretionary review.

After the Kentucky court proceedings were completed, Peabody filed for summary judgment in this case on the grounds of *res judicata*. On March 24, 1986, Peabody's motion was granted on the basis of the Kentucky judgment being *res judidata* of the issues presented for review in the federal Title VII action.

II.

On appeal both sides devote their arguments solely to whether this was an appropriate fact situation for the application of the principle of *res judicata.*[3] Although we conclude that the Kentucky court's determination that Maurya's complaint was not timely filed with the KCHR is binding on us, we find that this begins the inquiry rather than ends it.

Title VII provides that if a claimant alleges employment discrimination in a state that has a state agency which can provide a remedy for such discrimination, the claimant cannot file with the EEOC until 60 days after he begins a proceeding before the state agency, unless the state proceedings terminate before the expiration of the 60 days. 42 U.S.C. § 2000e-5(c). Kentucky is such a "deferral state" as a result of its establishment of the KCHR. In deferral states a claimant who files a claim with the state agency is given 300 days to file his claim with the EEOC. 42 U.S.C. § 2000e-5(e); *Mohasco Corp. v. Silver,* 447 U.S. 807 (1980).

In commenting on these Title VII requirements, the Seventh Circuit recently stated:

> The combined effect of sections 2000e-5(c) and (e) is to require the victim of alleged discrimination to file charges with a state agency if he is in a deferral state, and to do so at least 60 days before the 300th day after the alleged discrimination occurred, for if he files later he will not be able to file a charge with the EEOC by the 300th day unless the state agency obligingly terminates the proceeding before then.

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[3] There is no doubt that in appropriate circumstances a federal court will give preclusive effect to a decision of a state court which reviews a state administrative agency's determination of an employment discrimination claim. *Kremer v. Chemical Construction Corp.,* 456 U.S. 461 (1982).

Martinez v. United Automobile, Aerospace & Agricultural Implement Workers of America, Local 1371, 772 F.2d 348, 350 (7th Cir. 1985).

When Maurya filed his complaint with the EEOC, he would have been well within the 300-day requirement except for the fact that since he had not previously filed with the KCHR, his filing with the EEOC was ineffective until 60 days after he filed with the KCHR. This 60-day period did not begin to run until he did file with the KCHR on May 2, 1978. Thus, the effective date of the EEOC filing would be July 2, 1978, unless the KCHR terminated proceedings sooner than 60 days. Unlike the plaintiff in *Mohasco,* however, the July date presents no problem for Maurya because it only takes him to the 260th day of his 300-day filing period. The interesting question that this chronology does raise, however, is whether Maurya had 300 days to file with the EEOC in light of his failure to make a *timely* filing with the KCHR. Although the Supreme Court has never squarely ruled on this issue, they did indicate, at least in dictum in *Mohasco,* that a timely filing is not required. *See Mohasco,* 447 U.S. at 816 n.19.[4] More importanly, however, this circuit has specifically addressed the issue in at least two cases and has squarely concluded that a timely state filing is not required to give a claimant the benefit of the 300-day filing period with the EEOC. In a case arising in the Western District of Kentucky and involving the same Kentucky statutes and procedures we deal with here, we stated, "We therefore find that plaintiff Jones' action is not barred for failure to commence proceedings with the KCHR in a timely fashion under state law." *Jones v. Airco Carbide Chemical Co.,* 691 F.2d 1200, 1204 (6th Cir. 1982). Referencing *Jones,* we later held in *Rasimas v. Michigan Dept. of Mental Health,* 714 F.2d 614 (6th Cir. 1983), *cert. denied,* 466 U.S. 950 (1984):

[4] For an interesting discussion of the reason why a timely filing should be required, see Judge Posner's opinion in *Martinez v. United Automobile, Aerospace & Agricultural Implement Workers of America, Local 1373,* 772 F.2d 348 (7th Cir. 1985).

> Accordingly, we hold that deferral state claimants are not required to make a timely filing with the state agency before the federal 300 day filing period applies. All that is required is that a filing with the state agency be made with sufficient time to allow an effective filing with the EEOC within 300 days after the discriminatory act.

714 F.2d at 622.

The cases decided in this circuit reached this conclusion by making an analogy to the Supreme Court's decision in *Oscar Mayer & Co. v. Evans,* 441 U.S. 750 (1979), a case involving not Title VII but the Age Discrimination in Employment Act of 1967. Although one may question, as did Judge Posner in *Martinez,*[5] the wisdom of this rule as well as the *Oscar Mayer* analogy, this panel is not free to do so as we are bound by *Jones* and *Rasimas.*[6]

In conclusion, then, we hold that Maurya made a timely filing within 300 days with the EEOC and that he is not penalized for failure to timely file with the KCHR. We do give preclusive effect to the Kentucky court's determination that Maurya did not timely file with the KCHR,[7] but find that this does not divest the

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[5] *See supra* note 4.

[6] In neither *Jones* nor *Rasimas* were there state court proceedings. However, this difference is not meaningful since all that the state court proceedings here determined was that Maurya had not filed a timely petition before the state agency—a fact that was acknowledged in both *Jones* and *Rasimas.*

[7] As he did in the court below, plaintiff continues to argue that he, in fact, made a timely filing with the KCHR. On this issue there is complete preclusion as a result of the action of the Kentucky state courts.

district court below of jurisdiction, and thus we REVERSE and REMAND for further proceedings.[*]

ENGEL, Circuit Judge. I respectfully dissent. My disagreement with the majority stems wholly from a difference in analysis of the question to be decided. If, as the majority suggests, the sole issue is one of timeliness, then surely the majority is right in holding that the timely filing with the state agency in a deferral state is not a jurisdictional prerequisite to filing a complaint before the EEOC. Likewise the majority would be correct in allowing a subsequent suit in federal district court under Title VII provided the claimant filed his complaint with the EEOC within 300 days specified by statute. 42 U.S.C. § 2000e-5(e). Because plaintiff's complaint was filed 158 days after his termination the majority correctly holds that the EEOC and the district court had jurisdiction over his claim notwithstanding his untimely filing before the Kentucky Commission for Human Rights (KCHR). *Rasimas v. Michigan Department of Mental Health,* 714 F.2d 614, 620 (6th Cir. 1983). In reaching the conclusion that the state court proceedings had no further significance in this litigation, however, the majority introduces into this appeal an issue which was raised by neither party nor by the district court. To the district court, to the parties, and to me the question is not one of timeliness before the EEOC under *Rasimas,* 714 F.2d at 622. The issue rather is whether the state court proceedings under the circumstances here operate as *res judicata* to bar further federal proceedings even though the ultimate judgment in the state proceedings was

[*] Had plaintiff's state court action not beer procedurally barred by his untimely filing with the KCHR, he could have suffered *claim* preclusion even if he had not specifically asserted his federal claim. *See Migra v. Warren City School District Board of Education,* 465 U.S. 75 (1984). However, since plaintiff's access to the Kentucky courts was barred by his failure to first make a timely administrative filing, he had no opportunity to present his national origin discrimination claim. Under such circumstances, principles of res judicata are not applicable. *Whitfield v. City of Knoxville,* 756 F.2d 455 (6th Cir. 1985).

itself based upon a determination of untimeliness. The majority errs in disposing of this appeal on a ground not raised by the parties and not determinative of this court's jurisdiction since timeliness is not a jurisdictional question, *Zipes v. Trans World Airlines,* 455 U.S. 385, 393 (1982). It also errs in its failure to recognize the preclusive effects of the state court dismissal of Maurya's claim.

Underlying this case is the classic aphorism that hard cases make bad law. In a rather unexpected turn of events, a plaintiff who thought he had been successful on the merits and who was quite content to rely upon the administrative determination that his employer was guilty of discrimination, instead found that determination vacated and nullified by an adverse state court judgment based solely on his untimely filing before the KCHR. A defense of the dismissal ordered by the district court here and compelled in my view by case law is indeed difficult, but no more so than any case in which the merits are blocked by a procdural requirement.

The majority at least pays lip service to the principles of *res judicata* in footnotes 3, 5 and 8, and thus, presumably it would not quarrel with the Supreme Court's holdings in *Migra v. Warren City School District Board of Education,* 465 U.S. 75 (1984), *Kremer v. Chemical Construction Corp.,* 456 U.S. 461 (1982), and our circuit's holding in *Cemer v. Marathon Oil Co.,* 583 F.2d 830 (6th Cir. 1978). My point of difference with the majority concerns the importance accorded plaintiff's having done considerably more than file what was ultimately determined to be an untimely claim with the KCHR—plaintiff voluntarily proceeded to state court. No provision of Title VII requires a plaintiff to pursue in state court review of administrative action, but neither Title VII nor Supreme Court precedent "indicate[s] that the final judgment of a state *court* is subject to redetermination." *Kremer,* 456 U.S. at 469-70 (emphasis in original). Although Maurya obtained a generally favorable decision from the KCHR on the question of discrimination, he also appealed

its order to the Ohio [County] Circuit Court, where he challenged the Commission's determination that he was entitled to reinstatement only and not to back pay. His employer cross-appealed asserting that the action should be dismissed altogether because not timely under Kentucky law.

The state court judgment, to which the district judge gave preclusive effect, is therefore a judgment dismissing Maurya's claim because it was not timely filed and not because it lacked merit. Nonetheless, under Kentucky law as found by Judge Johnstone and not seriously disputed by the parties, as well as under the law of our circuit, the termination of such litigation for being untimely acts as a determination on the merits and is therefore entitled to preclusive effect under 28 U.S.C. § 1738. Judge Johnstone correctly examined the legal significance of the state court dismissal and concluded that it barred continuation of the federal suit:

> Pursuant to Rule 41.01 [of the Kentucky Rules of Civil Procedure], a voluntary dismissal, whether by the plaintiff, by stipulation or by order of the court, constitutes a dismissal without prejudice. An involuntary dismissal, however, (other than one for lack of jurisdiction, improper venue, or failure to join a party) "operates as an adjudication upon the merits" and constitutes a dismissal with prejudice. Ky. R. Civ. P. 41.03(3). Dismissal of an action with prejudice precludes another action on the same matter. *Polk v. Wimsatt,* 689 S.W.2d 363, 365 (Ky.App. 1985). The Final Judgment of the Hopkins Circuit Court ordered dismissal of Maurya's KCHR complaint *with prejudice.* Under Kentucky law, that judgment operates as a preclusive adjudication on the merits.

This case is unlike *Loudermill v. Cleveland Bd. of Educ.,* 721 F.2d 550 (6th Cir. 1983), *aff'd on other grounds,* 470 U.S. 532 (1985), in which this court refused to grant preclusive effect to an Ohio state court dismissal of an appeal from an adverse ad-

ministrative ruling. Ohio courts treat a failure to file a timely notice of appeal as a jurisdictional bar and not as an adjudication on the merits. In contrast, Kentucy expressly models its employment discrimination law on Title VII; the Kentucky court's direction to dismiss Maurya's claim "with prejudice" for untimeliness and not for lack of jurisdiction accords with *Zipes v. Trans World Airlines,* 455 U.S. 385, 393 (1982), in which the Supreme Court held that filing a timely charge of discrimination with the EEOC was not a jurisdictional prerequisite. The majority attempts to disregard the state court action on the basis that it was procedurally barred by the untimely filing before the KCHR. Neither the parties' arguments nor Kentucky law suports that view.

The proposition is well entrenched both in Kentucky and in federal law that Maurya is now precluded from pursuing his federal claim since he initiated his litigation in the Kentucky courts and could have achieved the benefit of a successful result which would have been binding upon his employer. Although Maurya's initial resort to the KCHR could not deprive him of his right to a federal trial on his Title VII claim, this does not mean that the state court judgment can be disregarded. *Kremer,* 456 U.S. at 477-78. Section 1738 of Title 28, as interpreted in *Kremer,* requires us to treat the adverse state court judgment, though itself based upon an issue of timeliness, as *res judicata.*

I would accordingly AFFIRM the judgment of the district court.

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APPENDIX B

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

October 1, 1987

Mr. Henry E. Hayden
Mr. John Gianoulakis

Re: Our Case No. 86-5450
Maurya vs. Peabody Coal Co.

Dear Counsel:

Enclosed in a copy of an order which was entered today in the above-styled case.

Very truly yours,

John P. Hehman, Clerk

/s/Michelle D. Marr
Deputy Clerk
(Ms.) Michelle D. Marr

Enclosure:

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 86-5450

MOTILAL MAURYA,
Plaintiff-Appellant,

v.

PEABODY COAL COMPANY,
Defendant-Appellee

FILED
October 1, 1987

BEST A

ORDER

BEFORE: ENGEL, KRUPANSKY and GUY, Circuit Judges

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/John P. Hehman
John P. Hehman, Clerk

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APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT OWENSBORO

CIVIL ACTION
80-0042-0(J)

MOTILAL MAURYA,
Plaintiff,

v.

PEABODY COAL COMPANY,
Defendant.

ORDER

This employment discrimination action is before the court on the defendant's motion for summary judgment on the ground of *res judicata*. For the reasons stated in the Memorandum Opinion this day entered, the defendant's motion is GRANTED, and the plaintiff's action is DISMISSED with prejudice. This is a final and appealable order.

IT IS SO ORDERED.

DATED: 3-21-86

/s/Edward H. Johnstone,
Chief Judge
United States District Court

ENTERED: March 24, 1986

BEST AVAI

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT OWENSBORO

CIVIL ACTION
80-0042-0(J)

MOTILAL MAURYA,
Plaintiff,

v.

PEABODY COAL COMPANY,
Defendant.

MEMORANDUM OPINION

This matter is before the court on the defendant's motion for summary judgment on the ground of *res judicata*. Plaintiff Motilal Maurya, whose nation of origin is India, is a former employee of defendant Peabody Coal Company ("Peabody"). In the Autumn of 1977, Peabody dismissed Maurya from his position as Section Foreman at its Alston No. 4 Coal Mine in Ohio County, Kentucky. Maurya subsequently filed complaints with both the Kentucky Commission on Human Rights ("KCHR") and the federal Equal Employment Opportunity Commission ("EEOC"). The complaints alleged that Peabody dismissed Maurya because of his national origin, an offense prohibited by KRS 344.040(1) and 42 U.S.C. 2000e-(a).

Upon investigating Maury's complaint, the KCHR issued an order finding that Peabody had discharged Maurya because of his national origin in violation of KRS 344.040. The order precipitated a flurry of motions and appeals by both parties until the Hopkins Circuit Court entered a Final Judgment that set aside the KCHR order and remanded the case to the Commission for entry of a new order dismissing Maurya's complaint

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with prejudice as untimely under KRS 344.200(1). Maurya appealed the circuit court's Final Judgment. Meanwhile, he filed a timely federal employment discrimination claim with this court.

On appeal, the Kentucky Court of Appeals affirmed the circuit court and agreed that Maurya's KCHR complaint had not been filed within the 180 day deadline imposed by KRS 344.200(1). The Kentucky Supreme Court denied discretionary review. These state proceedings, which afforded Maurya an opportunity for argument on (and review of) the deadline issue, satisfied the requirements of due process. This court will not review the state courts' interpretation of the procedural requirements of state employment discrimination law, nor their finding that the plaintiff's KCHR complaint was untimely.

Peabody argues that the dismissal of Maurya's untimely state complaint precludes his federal claim. Maurya counters that because the state court dismissed his claim without addressing its merits, his federal claim is not barred by *res judicata*. The issue before the court, therefore, is whether dismissal of a state claim as untimely precludes a timely filed federal claim.

Res Judicata

It is well settled that, under the Constitution's Full Faith and Credit Clause, "a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the state in which judgment was rendered." *Migra v. Warren City School Dist. Bd. of Educ.*, ____ U.S. ____, 104 S.Ct. 892, 896 (1984); *George v. United Kentucky Bank, Inc.*, 753 F.2d 50, 52 (6th Cir. 1985), *cert. denied*, ____ U.S. ____, 105 S.Ct. 2024 (1985). *See also*, U.S. Const., Art. IV, §1, 28 U.S.C. §1738; *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 102 S.Ct. 1883 (1982) (full faith and credit accorded state court judgment on claim of employment discrimination based on state law thereby precluding federal claim); *Unger v. Consolidated Foods Corp.*, 693 F.2d 703 (7th Cir. 1982) (full faith and credit accorded state court judgment

on claim of employment discrimination thereby precluding federal claim); *Santos v. Todd Pacific Shipyards Corp.*, 585 F.Supp 482 (E.D.Cal. 1984) (full faith and credit accorded state court judgment on claim of employment discrimination thereby precluding federal claim). Consequently, the court must consider what preclusive effect, in any, the dismissal of a claim as untimely has under Kentucky law.

Under Kentucky law, *res judicata* bars a second lawsuit if: (1) the parties in the second action were parties to the original suit; (2) the claims brought in the second action are identical to those brought in the original suit; and (3) the original suit was decided on the merits. *George,* 753 F.2d at 53, citing *Newman v. Newman,* 451 S.W.2d 417, 419 (Ky. 1970). The court notes, first, that the parties in Maurya's state and federal actions are identical. Second, both his state and federal complaints allege discrimination on the basis of national origin, an offense prohibited by KRS 344.040(1) and 42 U.S.C. 2000e-2(a). The Kentucky and federal statutes are identically worded, and evidence that would sustain a cause of action under Chapter 344 of the Kentucky Revised Statutes would sustain a cause of action under Title VII of the Federal Civil Rights Act of 1968. Consequently, Maurya's state and federal claims are identical for purposes of the Kentucky doctine of *res judicata. See Jackson v. Pepper Gasoline Co.*, 144 S.W.2d 212 (Ky. 1940). Having found that Maurya's state and federal actions involve identical parties and identical claims, only one question remains on the issue of *res judicata*: was the Kentucky suit decided on the merits?

Rule 41 of the Kentucky Rules of Civil Procedure defines the legal significance of various manners in which an action may be dismissed. Pursuant to Rule 41.01, a voluntary dismissal, whether by the plaintiff, by stipulation or by order of the court, constitutes a dismissal without prejudice. An involuntary dismissal, however, (other than one for lack of jurisdiction, improper venue, or failure to join a party) "operates as an ad-

judication upon the merits" and constitutes a dismissal with prejudice. Ky. R. Civ. P. 41.02(3). Dismissal of an action with prejudice precludes another action on the same matter. *Polk v. Wimsatt,* 689 S.W.2d 363, 365 (Ky.App. 1985). The Final Judgment of the Hopkins Circuit Court ordered dismissal of Maurya's KCHR complaint *with prejudice.* Under Kentucky law, that judgment operates as a preclusive adjudication on the merits.

Maurya argues that the circuit court's order of dismissal of his KCHR complaint as untimely did not constitute a decision on the merits for the purposes of the Kentucky *res judicata* rule. Rule 41.02(3) states three exceptions, *supra,* to the general rule that an involuntary dismissal constitutes a decision on the merits. The only exception remotely applicable to the circuit court's judgment is the one for "a dismissal for lack of jurisdiction."

The United States Supreme Court has ruled that a timely charge of discrimination with the EEOC is not a *jurisdictional* prerequisite for bringing suit, but a procedural requirement much like a statute of limitations. *Zipes v. Trans World Airlines,* 455 U.S. 385, 393, 102 S.Ct. 1127, 1132 (1982), *reh'g denied,* 456 U.S. 940, 102 S.Ct. 2001 (1982). Because Kentucky's employment discrimination law is expressly modeled on Title VII, this court believes that the Supreme Court's ruling in *Zipes* would be persuasive authority in a Kentucky court on the legal significance of the 180 day filing deadline. The 180 day deadline appears to be a procedural requirement which, like other deadlines imposed by state or federal procedural rules, can result in a dismissal with prejudice if ignored. *Cf. Id.,* 455 U.S at 393-394, 102 S.Ct. at 1132-33. The court finds, therefore, that the dismissal, with prejudice, of Maurya's KCHR complaint as untimely constituted an adjudication on the merits under Kentucky law and not a dismissal without prejudice for lack of jurisdiction.

Conclusion

Having found that: (1) Maurya's KCHR and EEOC complaints involved identical parties and identical claims; (2) the final judgment ordering dismissal, with prejudice, of Maurya's KCHR complaint as untimely constituted a decision on the merits; and (3) the state court proceedings on the dismissal satisfied the requirements of due process, THE COURT HOLDS that the dismissal of Maurya's state employment discrimination complaint as untimely precludes his timely federal claim. Maurya's federal claim is therefore dismissed with prejudice. An appropriate order shall accompany this Memorandum Opinion

DATED: 3-21-86

/s/EDWARD H. JOHNSTONE,
Chief Judge
United States District Court

ENTERED: March 24, 1986

APPENDIX E

SUPREME COURT OF KENTUCKY

82-SC-837-D
(81-CA-1716-MR)

HOPKINS CIRCUIT COURT
79-CI-729

MOTILAL MAURYA,
Movant,

v.

PEABODY COAL COMPANY AND
KENTUCKY COMMISSION ON HUMAN RIGHTS,
Respondent.

ORDER DENYING DISCRETIONARY REVIEW

The motion of Motilal Maurya for a review of the decision of the Court of Appeals is denied.

ENTERED December 7, 1982.

/s/Robert F. Stephens
Chief Justice

APPENDIX F

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

81-CA-1716-MR

MOTILAL MAURYA,
Appellant,

v.

PEABODY COAL COMPANY,
KENTUCKY COMMISSION ON HUMAN RIGHTS,
Appellees

APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE THOMAS B. SPAIN, JUDGE
CIVIL ACTION NO. 79-CI-729

ORDER DENYING PETITION FOR REHEARING

BEFORE: VANCE, GANT and McDONALD, Judges

The Court having considered the Petition for Rehearing and being sufficiently advised, it is ORDERED that the same is hereby DENIED.

ENTERED: September 24, 1982

/s/Roy N. Vance
Judge, Court of Appeals

APPENDIX G

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

No. 81-CA-1716-MR

MOTILAL MAURYA,
Appellant,

v.

PEABODY COAL COMPANY and
KENTUCKY COMMISSION ON HUMAN RIGHTS,
Appellees.

APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE THOMAS B. SPAIN, JUDGE
ACTION NO. 79-CI-729

OPINION RENDERED: March 12, 1982

AFFIRMING

BEFORE: GANT, McDONALD and VANCE, Judges.

GANT, JUDGE. Appellant was discharged by appellee Peabody Coal Company and filed a complaint with the Kentucky Commission on Human Rights. The Commission found that the discharge was based on discrimination because of national origin, which was reversed by the Hopkins Circuit Court on the basis that the appellant failed to file his complaint within the 180-day period prescribed by RKS 344.200(1).

The facts indicate that appellant was discharged on or about October 12, 1977 — admittedly it was some date in October. Appellant had been allowed to accumulate six weeks of vacation time in order to permit him to make a visit to his native home of India, which accumulation was contrary to company policy. In order to circumvent that policy, appellant was kept on the company payroll until November 23, 1977, and given a letter of termination dated on that date. However, the facts disclose that indeed the Commission either found, or its records show, that the termination was actually in October, 1977, and that the complaint was not filed until May 2, 1978, clearly past the 180-day mandate. The conclusion of the Commission that the complaint was timely filed, with these dates staring forth from its pages, was error.

We affirm the lower court and adopt its opinion.

ALL CONCUR.

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APPENDIX H

COMMONWEALTH OF KENTUCKY
HOPKINS CIRCUIT COURT
MADISONVILLE, KENTUCKY

ACTION NOS. 79-CI-698 and
79-CI-729
(K.C.H.R. No. 1137-E)

PEABODY COAL COMPANY,
Plaintiff,

v.

MOTILAL MAURYA and
KENTUCKY COMMISSION ON HUMAN RIGHTS,
Defendants.

FILED: MAY 27, 1981

FINAL JUDGMENT

This Court, having reviewed the entire record of the proceedings before the Kentucky Commission on Human Rights (the "Commission") and the pleadings and briefs filed by all parties in this consolidated action seeking review of the order of the Commission dated September 20, 1979, as amended by order of the Commission dated October 19, 1979, and having issued an Opinion herein dated April 16, 1981, which is incorporated herein by reference, does HEREBY ORDER AND ADJUDGE as follows:

(1) That the orders of the Commission dated September 20, 1979, and October 17, 1979, be set aside in their entirety, and

(2) That the case be remanded to the Commission for entry of an order dismissing with prejudice in its entirety Complaint No. 1137-E of Motilal Maurya as untimely under KRS 344.200(1).

This 27th day of May, 1981.

/s/Thomas B. Spain
Judge, Hopkins Circuit Court

APPENDIX I

COMMONWEALTH OF KENTUCKY
HOPKINS CIRCUIT COURT
MADISONVILLE, KENTUCKY

ACTION NOS. 79-CI-698 and
79-CI-729
(K.C.H.R. NO. 1137-E)

PEABODY-COAL COMPANY,
Plaintiff,

v.

MOTILAL MAURYA and
KENTUCKY COMMISSION ON HUMAN RIGHTS,
Defendants.

OPINION

These consolidated actions are before the Court on appeal from Findings of Fact, Conclusions of Law and Orders of the Kentucky Commission on Human Rights (Commission), which found that the Plaintiff Peabody Coal Company (Peabody), unlawfully discriminated against the Defendant Motilal Maurya (Maurya) in terminating his employment by reason of his national origin.

In its original Order entered on September 20, 1979, the Commission ordered Peabody to immediately cease and desist its unlawful practice of national origin discrimination and to repay on behalf of Maurya to the Kentucky Unemployment Insurance Fund all unemployment compensation which had been paid to Maurya to the date of the Order. No back wages were ordered paid to Maurya since the Commission found that he had not sought to mitigate his damages by exercising reasonable diligence in seeking other employment.

On October 17, 1979, following a motion by Maurya to

reopen the proceedings and the consideration by the Commission of memoranda from all interested parties, the Commission filed an Amendment to its earlier Order ordering Peabody to reinstate Maurya as a section foreman at Peabody's Alston No. 4 mine unless Maurya rejected such reinstatement.

Peabody filed an appeal in this Court, Action No. 79-CI-698, on October 15, 1979, from the original Order of the Commission and subsequently filed a second appeal on October 25, 1979, Action No. 79-CI-729, from the Order of the Commission as amended on October 17, 1979. These two actions were subsequently consolidated and there was merged therein an action brought by Maurya in the Ohio Circuit Court appealing from the Commission's denial of back wages. By reason of a venue ruling, all these appeals are pending in this Court.

The threshold procedural question raised by Peabody is whether Maurya's complaint of discrimination, filed with the Commission on May 2, 1978, was timely. If not, then the Orders of the Commission must be set aside and the Court need not reach the remaining contentions of the parties concerning whether Peabody in fact discriminated against Maurya by reason of his national origin in terminating his employment and, if so, whether the relief afforded by the Commission was proper.

KRS 344.200(1) provides that any complaint as to an unlawful practice under this Chapter " . . . must be filed within one hundred eighty (180) days after the alleged unlawful practice occurs." It is clear from the record that the unlawful practice complained of by Maurya was his discharege or termination of employment, allegedly motivated by bias against him because of his being a native of India. The difficulty in the case results from a dispute as to when he was discharged or terminated.

It is undisputed that on some day in October of 1977, Maurya was told by James Utley, Superintendent of Peabody's Alston No. 4 mine where Maurya worked, that he was discharged or

terminated. Peabody's evidence indicates that the date was October 12, 1977, while Maurya was unsure of the date, but recalled that it was in the second or third week of October, 1977. Moreover, it is undisputed that the said date of discharge was the last day upon which Maurya performed any work for Peabody. Notwithstanding these facts, Maurya had been permitted to accumulate six (6) weeks of vacation time so as to afford him sufficient time to make a round-trip visit to his native India. For that reason, his pay was permitted to accrue through November 23, 1977. Apparently, the commitment by Peabody management personnel to Maurya allowing him to accrue six (6) weeks of vacation pay was against company policy. For that reason, some of the personnel records of Peabody were falsified to show Maurya's date of discharge as November 23, 1977. In that way, it apparently was thought that the violation of the leave-time accrual policy could be hidden.

In his complaint filed with the Commission, Maurya cited November 23, 1977, as the date upon which the unlawful practice occurred. Similarly, the Commission in Paragraph 8 of its Findings of Facts, contained in the Order of September 20, 1979, apparently measured the one hundred eighty (180) days filing period from the falsified date of November 23, 1977. In so doing, it stated that Peabody's records indicated such a separation date from the company.

Notwithstanding the Commission's finding as to a separation date, the Commission in Paragraph 7 of its Findings stated unequivocally that Maurya was terminated by Jamie Utley in October of 1977.

Peabody's evidence further shows that Maurya was replaced after October 12, 1977, his admitted last workday, and that another management employee became section foreman of the unit where Maurya had worked. Furthermore, it is clear that Maurya left the United States on October 25, 1977, and made his round-trip visit to India from which he returned on

December 25, 1977. Upon his return, he went to Peabody's office where he picked up his check representing his vacation pay through November 23, 1977. He also picked up a formal letter of termination also dated November 23, 1977.

Staff counsel for the Commission argue that the complaint of unlawful discrimination was timely filed by Maurya based upon the dates of termination of employment reflected in Peabody's personnel records. Counsel further argue that Peabody should not be allowed to profit from the confusion it created as to Maurya's employment status. Counsel defend the Commission's finding of timeliness, explaining that the Commission instead of strictly observing the one hundred eighty (180) day period of limitations " . . . adopted a more flexible position . . . " The argument is further made that time periods under Title VII of the federal Civil Rights Act of 1964 have been suspended or tolled on equitable grounds in some cases. Citing *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924 (CA-5, 1975); *Leake v. University of Cincinnati*, 605 F.2d 255 (CA-6, 1979); and *Moses v. Falstaff Brewing Company*, 525 F.2d 92 (CA-8, 1975).

In responding to the Commission's argument, Peabody states that *Moses v. Falstaff Brewing Company, supra*, has been emphatically rejected by a number of later decisions, even including two (2) from the same Eighth Circuit that decided *Moses*. Peabody also cites the case of *Mohasco Corp. v. Silver*, ____ U.S. ____, 23 FEP 1 (1980) in support of its statement that the Supreme Court of the United States has rejected the liberal interpretation approach to periods of limitation. Finally, Peabody relies upon the most recent pronouncement of the United States Supreme Court in the case of *Delaware State College v. Ricks*, ____ U.S. ____, decided on December 15, 1980, wherein it was held that the complaint of unlawful discrimination based upon national origin must be dismissed where the complainant Ricks failed to file the same within one hundred eighty (180) days after the alleged unlawful employment practice occurred.

This Court agrees with Peabody that the prevailing case law holds that the one hundred eighty (180) day filing period must be strictly followed. Furthermore, the Court is of the opinion that the filing by Maurya of his complaint on May 2, 1978, was not timely, inasmuch as the record is clear that the actual date of Maurya's discharge was October 12, 1977, and such discharge was the only act of Peabody which could have amounted to an unlawful discriminatory practice. Here, it is of no consequence that Maurya was allowed vacation pay for six (6) additional weeks after his discharge, just as in the *Ricks* case it was of no consequence that Ricks was permitted to teach for an additional school year after the decision was made and communicated to him by the Board of Delaware State College to deny Rick's tenure. In both cases, the alleged discriminatory act occurred before the complainant ceased receiving remuneration from the employer. As Mr. Justice Powell stated in his opinion for the majority of the Court:

> "Where, as here, the only challenged employment practice occurs before the termination date, the limitations periods necessarily commence to run before that date. It should not be forgotten that time-limitations provisions themselves promote important interests; 'the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones.' Johnson v. Railway Express Agency, Inc., supra, at 463-464. See Mohasco Corp. v. Silver, ____ U.S. ____, _____ (1980)."

Here, the only alleged discrimination occurred — and the filing limitations period therefore commenced — on the date Utley made the decision to discharge Maurya and communicated that decision to him, i.e., October 12, 1977. That is so even though one of the effects of the discharge — termination of compensation — did not occur until six (6) weeks later. As held in *Abramson v. University of Hawaii,* 594 F.2d 202, 209 (1979),

"(t)he proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful."

In view of the finding of the Court that the complaint of Maurya was untimely filed as a matter of law, the Court does not reach the remaining contentions of the parties concerning the question of whether the finding of the Commission that Maurya was discharged unlawfully because of his national origin is supported by substantial evidence and whether the remedies afforded Maurya were proper.

The attorney for the Plaintiff may prepare a Judgment in conformity herewith incorporating this Opinion of the Court by reference.

This 16th day of April, 1981.

/s/Thomas B. Spain
Judge, Hopkins Circuit Court

APPENDIX J

COMMONWEALTH OF KENTUCKY
BEFORE THE KENTUCKY COMMISSION ON
HUMAN RIGHTS

COMPLAINT NO. 1137-E

MOTILAL MAURYA,
Complainant,

v.

PEABODY COAL COMPANY,
Respondent.

FINDINGS OF FACT

CONCLUSIONS OF LAW

ORDER

The Kentucky Commission on Human Rights, having considered the proceedings and all evidence admitted by the Commission at the public hearing held on April 4, 5 and 6, 1979, at Owensboro, Daviess County, Kentucky, finds as follows:

FINDINGS OF FACT

1. Complainant, Motilal Maurya, a native of India, was hired by the Peabody Coal Company on March 3, 1975, as a Safety Training Unit trainee.

2. Shortly thereafter, Complainant was promoted to Foreman Trainee and, after receiving his Kentucky Mining Papers, was, in October 1975, promoted to Section Foreman.

3. From his promotion in 1975 until sometime in the Spring of 1977, Complainant performed adequately his duties as Section Foreman.

4. In early 1977, management change was made in that Larry

Finley was named Director of the Eastern Division including the Alston #4 mine.

Larry Finley, from the time of his directorship, made several other personnel changes which resulted in May of 1977 in James Utley being appointed Superintendent of Alston #4 mine and Harold Burden being appointed Mine Manager.

5. Prior to the Burden and Utley appointments, Complainant had been considered a good employee by all supervisory personnel. Upon these appointments, Complainant was subjected to constant slurs and harassment and vilification based on his national origin by Harold Burden, Mine Manager. Harold Burden reported on Complainant's work performance to Jamie Utley, Mine Superintendent.

6. From the time that Burden and Utley came to work at Alston #4 mine, Complainant's safety record was comparable to or better than other Section Foremen employed at Alston #4.

7. In October of 1977, Jamie Utley terminated Complainant. It is the findings of this Commission that Complainant's national origin was a factor in such termination. While the evidence of slurs on national origin by Utley was not of the same persuasive nature as the evidence relating to slurs based on national origin by Burden, Burden's close association with Utley and Burden's responsibility of reporting on Complainant's work performance, and the fact that Complainant was the first and only Section Foreman who was discharged by the Respondent, all support the finding that Complainant's national origin was a factor in his discharge.

All other Section Foremen who were terminated had personnel records indicating something other than discharge.

8. It is the finding of this Commission that the complaint was timely filed in that all of the Respondent's records, comprising personnel forms, payroll records, termination letter, indicate

that the Complainant's separation from the Company occurred within 180 days from the date the complaint was filed.

9. The Commission finds that Complainant did not use reasonable diligence in seeking other employment after his discharge by Respondent. His attempts to find employment, according to the evidence, were limited to six letters, all written within a very short period of time. No other evidence of Complainant's efforts to locate employment were introduced from the date of his discharge to the date of the hearing in this matter.

CONCLUSIONS OF LAW

1. Respondent, Peabody Coal Company, is an "Employer" as defined by KRS 344.030(1). Complainant, Motilal Maurya, is an "Employee" as defined in KRS 344.030(4), and is an individual claiming to be aggrieved by an unlawful practice allegedly committed by Respondent in violation of KRS 344.040. Accordingly, the Kentucky Commission on Human Rights has jurisdiction over the parties and the instant controversy under the Kentucky Civil Rights Act.

2. Complainant filed a complaint with the Kentucky Commission on Human Rights in a timely manner as prescribed by KRS 344.200(1), and all procedural requirements with regard to the investigation, probable cause determination, conciliation, notice of hearing, and public hearing in this matter were in compliance with KRS Chapter 344.

3. KRS 344.040 makes it unlawful for an employer to discriminate against any individual with respect to the terms and conditions or privileges of employment and to discharge an individual because of that employee's origin.

4. Respondent terminated Complainant's employment because of his national origin, and thus engaged in an unlawful act of discrimination in violation of KRS 344.040.

5. A person who has been the victim of discrimination resulting in his discharge is under a duty to seek, with reasonable diligence, other employment, thus mitigating any damages suffered from the discriminatory act. Since Complainant did not, with reasonable diligence, seek other employment, therefore, he is not entitled to damages beyond the amount of unemployment compensation paid to him by the Kentucky Unemployment Insurance Fund.

ORDER

IT IS THEREFORE ORDERED that Respondent:

1. Immediately cease and desist its unlawful practice of national origin discrimination.

2. Respondent is further ordered to repay, on behalf of Complainant, all unemployment compensation paid to Complainant from November 23, 1977, to the present. This payment shall be made by check payable to "Treasurer, Kentucky Unemployment Insurance Fund," and shall be sent to the Division of Unemployment Insurance, Benefits Branch, Department for Human Resources, 275 East Main Street, Frankfort, Kentucky 40601.

This 20th day of September, 1979

/s/Edmund P. Karem, Chairperson
Kentucky Commission on
Human Rights

Supreme Court, U.S.
FILED
JAN 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1128

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

PEABODY COAL COMPANY, - - - Petitioner,

versus

MOTILAL MAURYA, - - - - - Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counsel of Record for Respondent

WESTERFIELD-BONTE CO., 619 W. KENTUCKY–P.O. BOX 3251, LOUISVILLE, KY.

QUESTION PRESENTED

Whether the Sixth Circuit's Decision Holding That an Untimely State Filing Does Not Bar a Timely Filed Federal Title VII. Action Is In Conflict With Other Lower Court Decisions Requiring Further Review by This Court.

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No. 87-1128

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

PEABODY COAL COMPANY, - - - *Petitioner,*

v.

MOTILAL MAURYA, - - - - *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable William H. Rehnquist, The Chief Justice, and Associate Justices of the Supreme Court of the United States.

STATEMENT OF THE CASE

Motilal Maurya was born in India. He was educated in India and West Germany and holds a Master's Degree in mining and metallurgical engineering from the Technical University, Berlin, Germany. He held several mine and mining related positions while in West Germany. He moved to the United States in 1968 and held additional positions in the mining industry.

He began work for Peabody Coal Company at their Alston #4, Underground Mine in Ohio County, Ken-

tucky, on March 3, 1975. He was promoted from management trainee to section foreman, a position he held until he was discharged in October of 1977.

In October, 1977, he was terminated by Mr. James Utley, Supervisor Employee of Peabody, although the personnel records of Peabody Coal Company indicate that Maurya's last day worked was November 9, 1977.

March 20, 1978—Maurya files a complaint with the Equal Employment Opportunity Commission (hereinafter EEOC) alleging discrimination in his dismissal from Peabody Coal Company, based on his national origin. The EEOC deferred to the State agency.

May 2, 1978—formal complaint filed by the Kentucky Commission on Human Rights (hereinafter KCHR) on behalf of Maurya.

The KCHR heard evidence concerning the charge of discrimination based on national origin. The evidence showed that the problems began for Mr. Maurya when there was a management change at Alston #4 Mine. Testimony heard by the Commission was replete with phrases like "Damn Indian. I hate Indians. I don't like you. I hate Indians. Any chance I get, I fire you and other damn Indians, too." R. 49.

Harold Burden, the mine manager, was quoted as saying that he didn't believe they ought to have women, negroes and Indians in the coal mines. R. 406. Statements were made by the mine manager like "I don't like damn indians" and "I'm going to fire every one I have". The superintendent had made statements

like "I don't like indians" and "we're going to get rid of you". R. 574.

On September 20, 1979, after hearing the evidence, the KCHR issued an order determining that Maurya was discharged by Peabody because of his national origin in violation of KRS §344.040. The Commission did not order Maurya reinstated and did not order backpay.

On October 1, 1979, Maurya filed a motion to reopen the proceedings before the KCHR requesting immediate reinstatement and back wages.

On October 15, 1979, Peabody filed the first of its two appeals in the Hopkins Circuit Court seeking judicial review of the Commission's September 20, 1979 order.

On October 17, 1979, the Commission issued an amendment to its order of September 20, 1979, in which is granted Maurya's motion to reopen and ordered that he be immediately reinstated.

On October 23, 1979, Maurya filed suit in the Ohio County Circuit Court seeking review of the Commission's order, denying him backpay.

On October 25, 1979, Peabody filed its second appeal to the Hopkins Circuit Court seeking judicial review of the Commission's September 20, 1979, order and October 17, 1979 amendment.

On January 20, 1980, the notice of right to sue letter was issued by the EEOC.

On April 16, 1980, Maurya filed his Title VII action in the U.S. District Court, Western District of Kentucky.

On May 27, 1981, (over a year after Maurya had filed his Title VII action in the District Court), the Hopkins Circuit Court issued a final judgment setting aside the order of the Commission and remanding the case to the Commission for the entry of an order of dismissal. The Court, in its opinion stated:

> "The threshold procedural question raised by Peabody is whether Maurya's complaint of discrimination, filed with the Commission on May 2, 1978, was timely. If not, then the order of the Commission must be set aside and the Court need not reach the remaining contention of the party concerning whether Peabody in fact, discriminated against Maurya . . .".
>
> ". . . in view of the findings of the Court that the complaint of Maurya was untimely filed as a matter of law, the Court does not reach the remaining contention of the party concerning the question of whether the finding of the Commission that Maurya was discharged unlawfully because of his national origin, is supported by substantial evidence and whether the remedies afforded Maurya was proper."

On March 12, 1982, the Kentucky Court of Appeals affirmed the decision of the Hopkins Circuit Court.

On September 24, 1982, the Kentucky Court of Appeals issued an order denying petition for hearing.

On December 7, 1982, the Supreme Court of Kentucky denied discretionary review.

On March 21, 1986, Judge Johnstone dismissed the Title VII action on the basis of res judicata based on the late Kentucky filing.

On July 2, 1987, the 6th Circuit reversed and remanded to the District Court. Rehearing was denied on October 1, 1987.

SUMMARY OF ARGUMENT

1. Motilal Maurya filed a timely Title VII claim with the EEOC, which deferred to the KCHR. The KCHR filed an untimely complaint, but found that Mr. Maurya had been discriminated against. The State Court decision that decided only that the State filing was untimely does not preclude Maurya from pursuing his Title VII action since the State made no finding that his claim of discrimination was meritless as in *Kremer* v. *Chemical Construction Corp.*, 456 U. S. 461 (1982).

2. The State Court action that determined only that the Kentucky filing was untimely, but specifically did "not reach the remaining contention of the parties concerning the question of whether the finding of the Commission that Maurya was discharged unlawfully because of his national origin, is supported by substantial evidence . . .", did not afford Maurya the opportunity for a full and fair opportunity to litigate his discrimination claim.